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Standing Committee on the Ombudsman

Nineteenth Report 1991



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LEGISLATIVE ASSEMBLY
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TORONTO, ONTARIO
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The Honourable David Warner, M.P.P.
Speaker of the Legislative Assembly

Sir,

Your Standing Committee on the Ombudsman has the honour to present its Nineteenth Report 1991 and commends it to the House.

Mark Morrow, M.P.P.
Chair

Queen's Park
May, 1992

**MEMBERSHIP OF THE
STANDING COMMITTEE ON THE OMBUDSMAN**

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TABLE OF CONTENTS

	<u>Page No.</u>
PART I: INTRODUCTION	1
PART II: SEVENTEENTH REPORT OF THE OMBUDSMAN	1
(a) Organization and Operation of the Ombudsman's Office	1
(b) Ombudsman's Jurisdiction Clarified	2
(c) Matters Outstanding from Previous Ombudsman and Committee Reports	3
(i) Ministry of Health - Mr. and Mrs. J	3
(ii) Ministry of Health - Mr. K, Mr. & Mrs. L, Ms. M	4
(iii) Ministry of the Environment	5
(iv) Ministry of Education - Mrs. H	12
PART III: EIGHTEENTH REPORT OF THE OMBUDSMAN	14
(a) Organization and Operation of the Ombudsman's Office	14
(b) Changes in the Format of the Annual Report	15
PART IV: EIGHTEENTH REPORT OF THE STANDING COMMITTEE ON THE OMBUDSMAN	18
(a) Debate by Legislature	18
(b) Responses of Governmental Organizations to Recommendations Contained in the Report	18
(c) Amendments to Regulations Under the <i>Ombudsman Act</i>	19
PART V: DEVELOPMENTS WITH RESPECT TO THE SPECIAL REPORT OF THE STANDING COMMITTEE ON FARM "Q" LTD.	20
PART VI: REPORT ON EXPANSION OF THE JURISDICTION OF THE OMBUDSMAN BY THE STANDING COMMITTEE	22
PART VII: PROCEDURES FOR REVIEWING THE FINANCIAL AFFAIRS OF THE OFFICE OF THE OMBUDSMAN	23
(a) Review of the Estimates of the Ombudsman	24
(b) Annual Audit Conducted by the Provincial Auditor	26
PART VIII: DEVELOPMENTS IN THE INTERPRETATION OF THE OMBUDSMAN'S MANDATE	28
(a) Role of the Ombudsman After Making a Report to the Legislature	28



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PART IX: COMMUNICATIONS FROM MEMBERS OF THE PUBLIC	33
(a) Developments in the Committee's Procedures for Reviewing Communications from the Public	34
(i) Release of Documents by the Ombudsman to the Committee	34
(ii) Disclosure of Information Concerning the Ombudsman's Investigation	36
(b) Outcome of the Committee's Review of Particular Complaints	40
(i) Ministry of Community and Social Services - Mrs. H	41
(ii) Board of Examiners in Psychology - Mr. V	42
(iii) Ministry of Correctional Services - Mr. VV	45
(iv) Workers' Compensation Appeals Tribunal - Mr. S	48
(v) Ministry of the Attorney General - Mr. A	49
(vi) Ontario Energy Corporation - Mr. R.S.	51
PART X: REVIEW OF THE <i>OMBUDSMAN ACT</i>	55
SUMMARY OF RECOMMENDATIONS	59

PART I: INTRODUCTION

This Report reviews the Ombudsman's Annual Reports for the fiscal years 1989-90 and 1990-91, as well as responses to the Standing Committee's Eighteenth Report, its Special Report on Farm "Q" Ltd., and its Report on Expansion of the Jurisdiction of the Ombudsman.

In addition, this Report reviews and comments on the following matters which concern the work of the Committee and the Ombudsman:

- The Ombudsman's role after making a report to the Legislature;
- The manner in which the financial affairs of the Office of the Ombudsman are reviewed; and
- The Committee's procedures for reviewing communications from the public which comment on the work of the Ombudsman.

In this latter respect, the Report also reviews the Committee's consideration of particular communications from the public which it has received since the Committee's last report, and sets out the Committee's recommendations on these cases. Finally, the Report comments on the need for a general review of the *Ombudsman Act*.

PART II: SEVENTEENTH REPORT OF THE OMBUDSMAN

(a) Organization and Operation of the Ombudsman's Office

The Ombudsman reports that during the 1989-90 fiscal year she took steps, through a reorganization of her management structure, to achieve greater consistency in handling requests for assistance, public education and administration across the nine District Offices. She also reports that, in particular, she took steps to improve the delivery of services to francophone clients by creating the position of French Language Services Officer. This position provides advice and assistance to senior staff regarding the provision of services to

francophone clients, and also provides outreach services to Ontario's francophone community.

The Ombudsman also reports that she further implemented the siting model for district offices developed in recent years by relocating the Ottawa office to a smaller and more cost-effective site, moving the Windsor office to a more central and independent site, reopening an office in North Bay, and beginning negotiations for a more visible and accessible office site in Kenora.

The present Ombudsman has also continued the work of her predecessors in undertaking public education to make the services of the Ombudsman better known. We continue to see this as a necessary component of the Ombudsman's work.

(b) Ombudsman's Jurisdiction Clarified

In the Committee's *Eighteenth Report* we noted that two court actions had been commenced by governmental organizations challenging the statutory authority of the Ombudsman to investigate their activities. Decisions have now been made in both these cases and in both instances the positions put forward by the Ombudsman were upheld.

In the first case, the previous Ombudsman had applied for a declaration that he had jurisdiction to investigate an act of the Board of Radiological Technicians. In this respect, the Board had taken the position that the Ombudsman had no authority to investigate it because of its status as an independent body supervising a self-regulating profession. The Ombudsman took the position that this board was no different than the Health Disciplines Board, which the Divisional Court in 1979 determined was within the Ombudsman's investigative jurisdiction. The court held in favour of the Ombudsman thereby confirming that the Ombudsman has the authority to investigate complaints against this Board.

The second case concerned whether the Ombudsman had jurisdiction to investigate the actions of civil servants carrying out their duties under the authority of an Order-in-Council. The Attorney General argued that because Orders-in-Council are the product of cabinet deliberations the Ombudsman has no jurisdiction to deal with them in any way. The Ombudsman argued that while the Ombudsman is prohibited from investigating the basis on which the Executive Council arrived at a particular decision, the Ombudsman does have jurisdiction to consider the effect of those decisions and to recommend that such decisions be reconsidered by government. The court again held in favour of the Ombudsman deciding that the Ombudsman may inquire into the effect of Orders-in-Council on the administration at large and on the affected public.

(c) Matters Outstanding from Previous Ombudsman and Committee Reports

(i) Ministry of Health - Mr. and Mrs. J

Special Report of the Ombudsman on Mr. and Mrs. J, considered in Standing Committee Report No. 17

This matter concerned the Ministry of Health's refusal to cover the cost of donor sperm required by Mrs. J for the purposes of artificial insemination. In its *Seventeenth Report* the Committee recommended:

That the Ministry of Health arrange to provide donor sperm to Mr. and Mrs. J at no cost as soon as an acceptable test has been developed to ensure that donor sperm is free from the HIV virus.

In the Committee's *Eighteenth Report* it noted that the Ministry had accepted the Committee's recommendation and had begun the process of approving a policy through which the province would cover the cost of donor sperm, including the public funding of semen cryobanks. However, the Ministry commented at that time that it had, in developing its policy, encountered a number of unanticipated delays of both a medical and legal nature, among which was the fact that there was not yet a fully satisfactory HIV screening test.

The Ministry advises that there now exists an acceptable HIV screening test. However, the Ministry has nonetheless decided not to proceed with funding of donor sperm at this time and has not therefore arranged to provide donor sperm at no cost to Mr. and Mrs. J. In this respect, the Ministry states that in this period of fiscal restraint, public funding of semen cryobanks is not a priority of the Ministry of Health. As well, in the Ministry's view the development of policy with respect to the payment for donor sperm must be undertaken in the context of a national framework on the use of new reproductive technologies, and in coordination with the federal government. However, such a national framework at present awaits the release of the Report of the Royal Commission on New Reproductive Technologies, which is expected within the next six months. Until that report is released, the Ministry does not foresee implementing a policy with respect to the funding of donor sperm.

The Committee recognizes the importance of the Ministry's reasons for delaying the development of a general policy in this area. We do however hope that the Ministry will continue to monitor national developments in this respect, and address the Committee's concerns at the appropriate time.

(ii) Ministry of Health - Mr. K, Mr. & Mrs. L, Ms. M

Special Report of the Ombudsman on Mr. K, Mr. & Mrs. L., Ms. M considered in Standing Committee Report No. 17

This matter concerned the Ministry of Health's restriction of companion travel grants under the Northern Health Travel Grant Program to those persons travelling with persons under the age of 18. In its *Seventeenth Report* the Committee recommended that:

The Ministry of Health amend Ontario Regulation 596/85 in order to remove all age restrictions pertaining to the provision of companion travel grants under the Northern Health Travel Grant Program.

The Ombudsman reported in her 1989-90 Annual Report that the program under which travel grants are provided was under review by the Ministry. The Ministry has since revoked Ontario Regulation 596/85 and replaced it with Ontario Regulation 311/91. The new regulation has removed the age restrictions on grants and now provides that:

- S. 4 A grant for a companion may be paid only if the travel is by aircraft, train or commercial bus and either,
- (a) the patient is less than sixteen years old; or
 - (b) the referring health professional gives a written opinion, before the travel takes place, that the patient is unable for health or safety reasons to travel without a companion.

Grants are therefore now available to anyone who is able to establish that there is a health or safety need for a companion to accompany a patient. The Committee commends the Ministry for its response to the recommendations of the Ombudsman and the Committee in this instance.

(iii) Ministry of the Environment

Complaint No. 10 in Ombudsman Report No. 11 considered in Standing Committee Report No. 12

This matter concerned the issue of the complainant's entitlement to claim and, in the appropriate circumstances, be awarded interest on monies found due and payable to him pursuant to *The Public Works Creditors Payment Act*.

In 1979 the complainant had made a claim against the Ministry of the Environment in relation to the rental of construction equipment to a contractor that was under contract to the Ministry. Following the Ministry's refusal to accept his claim he asked the Ombudsman to investigate his complaint. The Ombudsman did so and in response to the Ombudsman's recommendation the Minister referred the claim to an adjudicator. The adjudicator awarded the complainant \$27,730.00 for rental charges, but did not award an amount for interest charges on the claim.

On February 29, 1980 the complainant wrote to the Ombudsman's office and complained against the Ministry for failing to pay the interest charges. The Ombudsman investigated the complaint and recommended as follows:

That the Minister cancel his decision to accept the adjudicator's recommendation not to pay the complainant's claim for interest; that the Minister accept and consider the claim for interest as one properly made under the *Public Works Creditors Payment Act*.

The Minister refused to do so. Nonetheless, the Ombudsman chose not to send a copy of his report to the Premier. However, following the appointment of a new Ombudsman, on the request of the complainant, the new Ombudsman exercised his discretion and on March 22, 1984, referred the matter to the Premier for consideration.

The matter was referred to the Committee which considered the Ombudsman's recommendations. The Committee agreed with the Ombudsman's conclusions and therefore in its *Twelfth Report* recommended:

That the Minister of the Environment accept in principle that the Crown may, in the appropriate circumstances, pay a claimant interest due pursuant to a term of a contract with a contractor; and

That the Minister of the Environment consider the merits of the complainant's claim for interest owing on the principal amount in question and formulate a decision whether or not to pay such claim.

The Ministry's response to the Committee's recommendation was to accept in principle that it could in fact pay interest in appropriate circumstances and to consider the claim on its merits. However, having done so, it decided against paying interest. The Ombudsman was not satisfied with this response and questioned whether the Ministry, given its entrenched position, could have decided the question with objectivity.

The Ombudsman raised his concerns with the Committee which agreed that, in fairness to both the Ministry and the complainant, the matter needed to be assessed by someone other than the Ministry. In its *Thirteenth Report*, presented to the House in April, 1986, the Committee therefore recommended:

That an independent adjudicator be appointed to assess the matter of whether or not interest is owed to the complainant.

The Ministry accepted this recommendation and entered into negotiations with the complainant with respect to the terms of reference for the adjudication. In this respect, the Ministry prepared draft terms of reference which it proposed but which the complainant and the Ombudsman found unacceptable. As a result, the parties again appeared before the Committee on September 23, 1986. The Committee considered the concerns of the parties and recommended the following;

That the adjudication be styled as a hearing in the ordinary course, with an opportunity given to the parties to call and lead any evidence they consider appropriate;

That the principal amount upon which interest is to be calculated be clearly stated as a sum not to exceed \$27,730.00;

That the rate of interest applied by the adjudication be determined in accordance with the *Courts of Justice Act*; and

That the costs of adjudication be paid by the Ministry, except for the complainant's legal costs.

The Committee continued to monitor this situation and in March, 1988 again invited the Ministry to appear before it to explain why no progress had been made toward the appointment of an adjudicator. While the Ministry agreed to make an offer as to the terms for the adjudication to the complainant within a week, this was not done and the Committee again asked the Ministry to appear before it on May 25, 1988. At that time, the Ministry apologized for the manner in which this

case had been handled and gave assurances that steps would be taken immediately to finalize the terms of the arbitration.

An agreement on the terms of the arbitration was reached in September, 1990. With an agreement in place the complainant and the Ministry proceeded to act upon it. This first required the selection of an arbitrator. Pursuant to the terms of arbitration the parties were to each nominate 3 persons from whom an arbitrator was to be selected. The agreement further provided that in the event no nominee was acceptable to both parties then:

. . . either party may request the Ombudsman to designate an adjudicator from among the six persons so nominated and the Ombudsman may do so within 60 days of being requested to do so.

This clause had been included in the agreement with the knowledge and consent of the previous Ombudsman, and had formed part of the draft terms of arbitration presented to the Committee in September, 1986.

The complainant and the Ministry were unable to agree upon a suitable arbitrator. As a result, by letter dated November 1, 1990 the complainant wrote to the Ombudsman requesting that she select an arbitrator from among those nominated. On December 17, 1990, counsel for the Ombudsman confirmed receipt of this letter and stated that their office was reviewing the material and would be contacting him as soon as the Ombudsman had made a decision. On March 27, 1991, the Ombudsman wrote to the complainant's solicitor to inform him that she would not select an arbitrator as requested. In particular, the Ombudsman stated:

Notwithstanding any informal assistance which the staff of the former Ombudsman may have provided to assist the parties to resolve this matter, given the inordinate amount of time which the parties have allowed to pass since the 1979 recommendation and the fact that the responsibilities within the Ombudsman's legal mandate have been fulfilled, I see no further role to be played by me or my staff in this matter.

The Ombudsman's decision not to select an arbitrator had the effect of frustrating the arbitration agreement, making it necessary to reach a new agreement on the mechanism to select an arbitrator. Since the complainant was not confident that the Ministry would be agreeable to a new approach he contacted the Committee and asked if it could convince the Ombudsman to select an arbitrator.

As requested by the complainant, in December, 1991 the Committee discussed with the Ombudsman her refusal to select an arbitrator. The Ombudsman reiterated her view that her office had fulfilled its responsibilities in this case. In particular, she stressed two things. First, however previous Ombudsman may have interpreted their mandate, in her view she did not have the power to provide the assistance requested. Second, she stated that in this instance the previous Ombudsman had completed the Office's responsibilities once he made a report to the Legislature. The Act, she argued, does not provide for her to play any further role once this is done.

The Committee has a number of concerns with respect to what has occurred in this matter. We continue to be concerned at the unconscionable length of time it has taken to resolve this matter. We realize that there have been a number of reasons for the series of delays which have occurred, but feel that it is fair to say that the Ministry of the Environment must bear the primary responsibility in this regard. We also have considerable concerns with the manner in which the present Ombudsman has responded to the request of the parties to select an arbitrator. The fact is that throughout the protracted negotiations which have occurred the Office of the Ombudsman has played a key role in pushing this matter forward and bringing to the Committee's attention delays on the part of the Ministry. In turn, the complainant has placed considerable reliance on the Ombudsman. This reliance is manifested by the inclusion in the arbitration agreement of the clause which provided that the Ombudsman would select an arbitrator in the event that the complainant and the Ministry were unable to agree on one. As we have noted above, the previous Ombudsman had agreed to perform this role and was aware

that the parties had placed this clause in the agreement in reliance on the fact that he would so act.

We appreciate that different Ombudsmen may have different interpretations of their powers. However, we believe that people dealing with the Office of the Ombudsman must be able to rely on the views and agreements expressed by it. In particular, we believe that the Ombudsman should be particularly accommodating in attempting to ensure that the public is not prejudiced by a change in approach that she may take as compared with previous Ombudsmen.

The Ombudsman has argued that the Act does not expressly empower her to assist the parties in the manner her predecessor had agreed to act. In this respect, we note that there are a number of functions which this Ombudsman and others perform that are not expressly mandated by the Act. These include assisting parties not strictly within her jurisdiction by providing referrals or making inquiries on their behalf, and engaging in public education with respect to the work of the Ombudsman. As well, the Ombudsman herself notes in her most recent report that she helped facilitate a satisfactory resolution in 2,303 cases even though the cases were "not strictly within her jurisdiction."

We do not question the propriety of the Ombudsman acting in this way. We believe that these are natural and necessary functions which are integral to the fulfilment of the objects of the Act, and that they are consistent with the direction of the Supreme Court of Canada that the Act receive a "broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil." We believe, however, that providing informal assistance to parties to assist them in reaching a settlement of their dispute, as was asked of the Ombudsman here, is also a natural function for the Ombudsman to perform. In addition, it is a function which we believe would, by giving the Act a "broad, purposive interpretation," be permitted in the way the other functions the Ombudsman continues to perform would be. Therefore, while we believe that it may have been a matter of discretion as to whether the Ombudsman chose to fulfil

her predecessor's undertaking to select an arbitrator, we believe that it was open to her to have chosen to so act.

In summary, we note that the complainant and the Ministry have placed reliance on the Office of the Ombudsman to select an arbitrator. We also note that the Ombudsman was asked to simply select one name from a list of six nominees which were provided to her, an act we believe was within her power to perform. She was not asked to in some way enforce the recommendation of the Ombudsman or the Committee.

We also note the extraordinary circumstances concerning the complainant's claim, particularly the delay of some 12 years in responding to his claim. In this respect, we are concerned by the Ombudsman's reference, in her response to the complainant, to the "inordinate amount of time which the parties have allowed to pass since the 1979 recommendation." This suggests that the complainant is in part responsible for the delay which has occurred since 1979. However, as our review above indicates, the complaint in question was not made until 1980, the Ombudsman did not refer his report to the Premier until 1984, and it was not until 1986 that the Ombudsman suggested that someone other than the Ministry consider the claim for interest. As well, the bulk of the delay from that time until May, 1988 was, by their own admission, attributable to the Ministry. To suggest, as we believe the Ombudsman has, that the complainant is in some way responsible for the unconscionable manner in which he has been treated, reflects a lack of understanding on the part of the Ombudsman of the implications of her refusal to act as requested.

Given all of the above we feel strongly that the Ombudsman should have agreed to select an arbitrator. However, since she has taken the position that the Act does not empower her to do this we believe it would be inappropriate for the Committee to recommend that she do so. Nonetheless, as we have indicated above, we have serious concerns about her interpretation of her mandate in this

regard. In order to prevent the recurrence of a similar situation in the future we believe the Act should be clarified and therefore recommend:

1. That consideration be given to amending the *Ombudsman Act* to provide that the Ombudsman has the power, on the request of a complainant and a governmental organization, to assist them in reaching a settlement of their dispute. This possible amendment should be considered as part of a more general review of the *Ombudsman Act* to be conducted by this Committee.

In light of our decision not to recommend that the Ombudsman select an arbitrator, we have taken steps to ensure that the complainant and the Ministry make alternative arrangements to agree on an arbitrator. As a result of the further discussions which have occurred, the complainant and the Ministry have now agreed on a person to select an arbitrator in place of the Ombudsman, and that person has agreed to do so. We are confident that this matter will now proceed but will continue to monitor it closely.

(iv) Ministry of Education - Mrs. H

Special Report of the Ombudsman on Mrs. H considered in Standing Committee Report No. 17

This case concerned the Ministry of Education's decision denying Mrs. H a survivor allowance under the Teachers' Superannuation Fund. This decision was based on the relevant provisions of the *Teachers' Superannuation Act* and the *Teachers' Superannuation Act, 1983* which limited the circumstances in which a dependent's allowance was payable to a surviving spouse of a deceased person. The Committee considered the case and in its *Seventeenth Report* made the following recommendations:

That the Ministry of Education cause the Teachers' Superannuation Commission to pay Mrs. H survivor benefits as of August 8, 1985, and that the Ministry of Education, within three months of this motion, on or about November 22, 1988, report to this Committee on the advisability of extending this

benefit as a matter of right to spouses of Teachers' Superannuation Fund members adversely affected.

That the Committee direct the working group (as set up by the Minister of Education) to deal with the issue of Mrs. H's pension and the general issue of pensions, as soon as possible.

That the Minister of Education in conjunction with any other governmental organization it deems necessary, issue an *ex gratia* payment to Mrs. H as soon as possible, effective from the first day of the month following the date of her inquiry for same, until the amended provision is in force. Such a payment can be made through the annual budgetary process, so that no question will arise as to the authority of the Ministry to make the payments; and

That the Minister of Education in conjunction with any other governmental organization he deems necessary, make spousal payments to any other surviving spouses who have been denied a full dependent or survivor allowance by the *Teachers' Superannuation Act* or the *Teachers' Superannuation Act, 1983*, payable from the first day of the month following the date of their request for a benefit as a result of this recommendation.

At the time of the Committee's *Eighteenth Report* the Committee noted that these recommendations remained outstanding and that it would be seeking an explanation from the Ministry as to why their implementation had been delayed.

The Ombudsman notes in her 1989-90 Annual Report that the necessary amendments have now been adopted and payment has been made to Mrs. H. The amendments are found in the *Teachers' Pension Act, 1989*, as amended, and in particular ss. 70-72 of Schedule 1 of that Act. The Committee commends the Ministry of Education for its response to the recommendations of the Committee and the Ombudsman.

PART III: EIGHTEENTH REPORT OF THE OMBUDSMAN

(a) Organization and Operation of the Ombudsman's Office

There have been a number of developments in the work of the Ombudsman during the 1990-91 fiscal year. The Ombudsman reports that during the year the North Bay office was reopened and that the Kenora office was relocated to a more visible and accessible location. As well, to increase accessibility a TDD (Telecommunication Device for the Deaf) line for communicating with persons who are hearing impaired or deaf was installed in the Ombudsman's central office.

The Ombudsman also reports that she has reorganized her administration into three directorates: Human Resources, Community Access and Intake, and Investigative and Legal Services. She also hired a consultant to develop a salary plan for her employees and began to implement an internal staff identification and tracking system to assist her in developing employment equity policies, goals and timetables for achievement. The Ombudsman also began a program of cross-cultural sensitivity training for employees to operate on a continuing basis.

The Ombudsman also reports that in the winter of 1990-91 she commissioned a survey to assist her in identifying the public's awareness of the services which the Ombudsman offers. This survey was conducted by telephone and took place between February 18 and March 3, 1991.

Some of the survey findings, as reported by the Ombudsman, are as follows:

- One person in five said they had a complaint in their dealings with government administration. Most frequently, the complaint was about excessive delay or an unfair decision, and most had done nothing about the complaint.
- Those most vulnerable have a higher proportion of complaints.
- 69% of people are aware of the Ombudsman, and generally had an accurate perception of the Ombudsman's jurisdiction and mandate - but awareness was higher among those with greater education and lower among the more vulnerable. As well, awareness of the Ombudsman was

low in comparison with the Ontario Human Rights Commission (95%) and the Workers' Compensation Board (97%).

- 52% of Ontarians feel that they are not well protected against unfair government action. This sense is particularly marked among those who are most vulnerable.

The Ombudsman adds that the survey revealed that the Ombudsman's network of regional offices is particularly important in promoting the perception of easy access to the services of the Ombudsman.

The Ombudsman indicates that she is carefully studying the survey and formulating initiatives to ensure that Ontarians recognize the role the Ombudsman can play in improving the quality of government administration. She has indicated that she will be in a position to comment on the steps to be taken in her next Annual Report.

Finally, the Ombudsman reports that it was unnecessary, in order to have her recommendations implemented, for her to seek the intervention of the Legislative Assembly during the past fiscal year. There have, therefore, for the purposes of the Committee's work, been no recommendation denied cases which it has had to consider.

(b) Changes in the Format of the Annual Report

The format of this Annual Report is substantially changed over previous years. The Ombudsman has indicated that these changes are directed toward making the Report more inviting, and form part of a more general approach of attempting to make the Ombudsman's services more accessible.

We share the Ombudsman's view of the importance of making her services more accessible and agree that her Annual Report can play a role in that regard. The new format does present the information in a more inviting and accessible manner and we commend the Ombudsman for her efforts in initiating these changes. The

Ombudsman also indicates that the new format has led to some cost savings related to a less expensive cover and to the decision to make French-language and English-language copies available separately.

While the Committee is generally pleased with the new format, it does have concerns with respect to some of the information which has been omitted. The information which has been omitted and which the Committee would like to see included in future reports is:

- comparative data from the previous fiscal year;
- graphs which show the number of complaints brought against a particular governmental organization, and the stage at which those complaints were resolved; and
- the tables which indicate the status of any recommendations outstanding from previous years.

The Committee has found each of these items of information to be helpful in the past. We believe that including comparative data from the previous fiscal year would enable the Committee to easily identify changes in the nature and size of the Ombudsman's caseload. Similarly, we believe that the graphs which set out the number of complaints brought against a particular governmental organization, and the stage at which those complaints were resolved, were useful in assisting the Committee in monitoring the nature and distribution of the Ombudsman's workload and government responsiveness. In this respect, in the Committee's recent meetings with the Ombudsman she indicated that she is considering ways in which to evaluate the performance of governmental organizations, and that, in particular, she is looking into examining government response times to Ombudsman inquiries and recommendations. While we hope the Ombudsman will pursue these matters and look forward to receiving the Ombudsman's comments on them in the future, we also believe that the information previously included should continue to be included in the Ombudsman's Reports.

As we noted, we are also concerned with the omission from the Ombudsman's report of the tables which show the status of all Ombudsman and Committee recommendations still outstanding from previous years. These tables had, in the past, served as a way of monitoring the progress which had been made in achieving the implementation of recommendations. Such monitoring is of critical importance in maintaining pressure on governmental organizations to address such recommendations.

We believe therefore that these tables should continue to be included in the Ombudsman's reports. We recognize that the Ombudsman's decision to eliminate the tables was based on her view that this practice was outside her mandate because it required her involvement in cases after she had reported to the Legislature on the case, and it is her position that she has no authority to act once she has reported to the Legislature. We disagree with the Ombudsman's interpretation of her mandate in this regard and present our reasons in this respect later in the section entitled "Role of the Ombudsman After Making a Report to the Legislature".

In summary, we believe that the information discussed above which has been omitted in the present annual report should be included in all future annual reports. We therefore recommend:

- 2. That the Ombudsman include in his or her Annual Reports the following information:**
 - (a) comparative data from the previous fiscal year;**
 - (b) graphs which show the number of complaints brought against a particular governmental organization and the stage at which those complaints were resolved; and**
 - (c) tables which indicate the status of any recommendations outstanding from previous years.**

PART IV: EIGHTEENTH REPORT OF THE STANDING COMMITTEE ON THE OMBUDSMAN

(a) Debate by Legislature

The *Eighteenth Report* of the Standing Committee on the Ombudsman was tabled in the Legislature on December 6, 1989. There has been no debate of the Committee's Report.

(b) Responses of Governmental Organizations to Recommendations Contained in the Report

(i) Ministry of Health - Ms. W

In its *Eighteenth Report*, the Committee considered a complaint which concerned the Ministry of Health's refusal to reimburse Ms. W for the cost of renting an electric breast pump, which she required for the feeding of her prematurely born baby. In its Report the Committee made the following recommendations:

The Ministry of Health should further consider including, as an insured service, the cost of electric breast pumps specifically for feeding premature infants, by amending its criteria for defining "special appliances" in Section 53(1) 9 of Regulation 452 under the Health Insurance Act, such that breast pumps are excluded from this category, and included under Section 39 of Regulation 452, specifically for premature babies when prescribed by a physician or the medical staff of a hospital.

The Ministry of Health should also develop clear criteria for managing the Assistive Devices Program.

The Ministry should re-evaluate the adequacy of the process through which it determines what programs, devices, and benefits are funded by the Ministry of Health.

In her 1989-90 Report the Ombudsman reported that the Ministry had undertaken and completed a review of its Assistive Devices Program, and that a report was expected to be made public in the near future.

Following these developments, we wrote to the Ministry of Health to determine what steps had been taken toward the fulfilment of the Committee's recommendations, and to request copies of any reports in this regard. Unfortunately, we have not yet received the Ministry's response. However, the Ministry of Health has advised that in the near future it will provide to the Committee a full report on the steps it has taken toward the implementation of the Committee's recommendations.

We look forward to receiving the Ministry's response and to reporting on the progress which has been made in the implementation of the Committee's recommendations.

(c) Amendments to Regulations Under the *Ombudsman Act*

In its *Eighteenth Report*, the Committee recommended:

That section 4(ii) of Regulation 697 under the *Ombudsman Act* be amended to state:

No member of the Ombudsman's staff shall express to anyone other than the Ombudsman, or delegate of the Ombudsman, any opinion, recommendation, or other similar comment respecting the matter being investigated or respecting anything else arising out of the investigation.

This recommendation has not been implemented. For this to occur the Assembly must adopt the Committee's Report, and specifically this amendment, since it is the Assembly which has the power to amend regulations made under the *Ombudsman Act*. As we noted above, the Assembly has not yet debated and adopted the Committee's *Eighteenth Report*.

This is the only recommendation in the Committee's *Eighteenth Report* which has not been adopted. We believe this amendment is important and therefore recommend:

3. That section 4(ii) of Regulation 697 under the *Ombudsman Act* be amended to state:

No member of the Ombudsman's staff shall express to anyone other than the Ombudsman, or delegate of the Ombudsman, any opinion, recommendation, or other similar comment respecting the matter being investigated or respecting anything else arising out of the investigation.

PART V: DEVELOPMENTS WITH RESPECT TO THE SPECIAL REPORT OF THE STANDING COMMITTEE ON FARM "Q" LTD.

On April 19, 1990 the *Special Report of the Standing Committee on Farm "Q" Ltd.* was tabled and debated. The motion to adopt the Report was moved and carried on June 28, 1990.

This *Special Report* concerned a case in which the Ministry of Agriculture and Food had refused to implement the Ombudsman's recommendation that it compensate Farm Q for losses Farm Q claimed it suffered as a result of its reliance on inaccurate data produced and published by the Ministry in 1984. The matter came before the Committee. After a series of recommendations which proved to be ineffective in obtaining a resolution of this matter, the Committee delivered its *Special Report* in which it made the following recommendation:

Whereas the Committee has determined that the Ministry of Agriculture and Food should compensate for losses suffered, if any, in the subject case, the Committee resolves that the quantum of damages, if any, be determined by expeditious and binding arbitration of a single arbitrator to be named by the Office of the Ombudsman and the Ministry of Agriculture and Food. In the absence of agreement, then by three arbitrators, one to be

designated by the Office of the Ombudsman and one to be determined by the Ministry of Agriculture and Food and a third to be chosen by the two previously designated arbitrators. The award of two of these three arbitrators shall be binding. The rules of the arbitration shall be the Rules for the Conduct of Arbitrations of the *Arbitrators' Institute of Canada*. Cost of the arbitration shall be borne equally by the Office of the Ombudsman and Ministry of Agriculture and Food.

Following receipt of this recommendation, the Ombudsman informed the Committee that the *Ombudsman Act* did not grant her the jurisdiction to undertake the course of action recommended. As a result, the arbitration did not proceed and the complainant approached the Committee requesting that it address the problems presented by the Ombudsman's position.

The Committee met to consider the matter in April, 1991. It was decided that the Ombudsman should not be involved in the arbitration and that the recommendation made in its *Special Report* should be amended accordingly. The Committee therefore passed the following resolution:

Whereas the Committee has determined that the Ministry of Agriculture and Food should compensate for losses suffered, if any, in the subject case, the Committee recommends that the parties submit to a process of binding and expeditious arbitration to determine the quantum of damages. The Committee further recommends that the parties agree to the following terms of the arbitration: The arbitration should be conducted by a single arbitrator to be named by Farm Q Ltd. and the Ministry of Agriculture and Food. In the absence of agreement, then the arbitration should be conducted by three arbitrators, one to be designated by Farm Q Ltd., one to be designated by the Ministry of Agriculture and Food and the third to be chosen by the two previously designated arbitrators. The award of two of these three arbitrators shall be binding. Failing the agreement of two arbitrators then the decision of the third appointed arbitrator shall be binding. The rules of the arbitration shall be the Rules for the Conduct of Arbitrations of the

Arbitration and Mediation Institute of Canada Inc..
Costs of the arbitrator(s) should be borne by the Ministry of Agriculture and Food. Costs of the parties should be awarded by the arbitrator(s) in his/her discretion.

The Committee's amended recommendation was delivered to both Farm Q and the Ministry of Agriculture and Food. Subsequently, Farm Q and the Ministry attempted to negotiate the terms of arbitration but were unable to reach an agreement in this respect. As a result, in August, 1991 counsel for Farm Q contacted the Committee and asked that it look into the situation to determine whether it could assist in resolving the matter. The Committee reviewed the responses of both parties to its recommendation and had discussions with each side in an attempt to identify the points of disagreement. In the course of those discussions, the Committee was informed by the Ministry that it was in the process of finalizing an offer to settle the matter, which it subsequently presented to Farm Q. Farm Q considered the offer and in December, 1991, Farm Q and the Ministry of Agriculture and Food reached a settlement agreement which provided that the Ministry would pay Farm Q \$250,000 as a full and final settlement of Farm Q's claim against the Ministry. The Ministry stated, however, that it continued to deny legal liability, and that it did not recognize the case as a precedent.

Although the Committee is concerned at the length of time it took to resolve this matter, it commends both parties for their efforts in reaching a settlement and preventing any further delays.

PART VI: REPORT ON EXPANSION OF THE JURISDICTION OF THE OMBUDSMAN BY THE STANDING COMMITTEE

On November 23, 1989, the *Report on Expansion of the Jurisdiction of the Ombudsman by the Standing Committee* was tabled and debated. The report has not yet been adopted.

The Committee's report examined the possibility of expanding the Ombudsman's jurisdiction to include Public Hospitals, Children's Aid Societies and the Ontario New Home Warranty Program. These had been areas which a 1986 position paper by the previous Ombudsman, Dr. Hill, had recommended be added to the Ombudsman's jurisdiction. Although Dr. Hill felt that the ombudsman function should be extended in a number of other areas as well, he believed that the Office of the Ontario Ombudsman could only accommodate expanded jurisdiction over the areas noted.

The Committee's report concludes that the Ombudsman's jurisdiction should not be expanded into the areas suggested. However, in this respect, two members of the Committee dissented and would have supported an expansion of the Ombudsman's jurisdiction.

We have reviewed the Committee's conclusions. We believe the question of expanded jurisdiction is one of importance. However, we recognize that it is also a question which requires an assessment of a number of complex considerations including the availability of resources, the existence of adequate alternative means of redress and the possession of expertise in the area to be reviewed. We believe therefore that it is a question which should form part of the comprehensive review of the Act we have recommended elsewhere. Accordingly, we recommend:

4. **That the question of expansion of the Ombudsman's jurisdiction form part of a more general review of the *Ombudsman Act* to be conducted by the Committee.**

PART VII: PROCEDURES FOR REVIEWING THE FINANCIAL AFFAIRS OF THE OFFICE OF THE OMBUDSMAN

The Committee has a number of concerns with respect to the manner in which the financial affairs of the Office of the Ombudsman are currently reviewed. In this respect, the Committee has two areas of particular concern:

- the manner in which the estimates of the Ombudsman are reviewed; and
- the scope of the audit performed annually by the Provincial Auditor.

(a) Review of the Estimates of the Ombudsman

In the Second Report of the Select Committee on the Ombudsman (1977) it was recommended that the Committee's terms of reference be expanded to include the review of the Ombudsman's estimates. This recommendation followed similar recommendations in the *Final Report of the Select Committee on the Fourth and Fifth Reports of the Ontario Commission on the Legislature* (1976) and in the *Report of the Select Committee on the Rules and Guidelines for the Ombudsman* (1975). These recommendations, as the Committee suggests in its *Second Report*, reflected the fact that, by the nature of its terms of reference and continuing relationship with the Office of the Ombudsman, the Committee acquires the knowledge, experience and insight into that office to enable it to enquire into the Ombudsman's estimates. Following these earlier recommendations and the Committee's continued support for them, in 1983 the terms of reference of the Committee were officially expanded to include the responsibility of reviewing and reporting on the estimates of the Ombudsman. The Committee fulfilled this responsibility annually until 1989.

In 1989 the responsibility for reviewing the estimates of the Ombudsman was assigned to the Standing Committee on Estimates. At that time, it was decided that this specialized committee should be created to examine the estimates of all of the over 40 Ministries and Offices of the Legislature, including the estimates of the Ombudsman. The procedure followed by the Standing Committee on Estimates, as set out in Standing Orders 54-64, provides that all estimates are tabled no later than five sessional days following the presentation of the budget. These estimates are deemed to be referred to the Standing Committee on Estimates which must select not fewer than six and not more than 12 ministries and offices to be considered. Any estimates which are not selected for consideration by the

Committee are automatically deemed to be passed by the Committee and are reported back to the House.

The estimates of the Ombudsman have not been selected for consideration since this procedure was adopted in 1989. As a result, in each of those years the Ombudsman's estimates have been approved without any review. As a consequence, the estimates of the Ombudsman have not been considered in committee since our Committee last reviewed the estimates for the 1987-88 fiscal year.

The Committee is concerned with this situation. The Committee's responsibility to review and report on the affairs of the Office of the Ombudsman, we believe, includes ensuring that the financial affairs of the Ombudsman are properly reviewed. We do not believe that the estimates of the Ombudsman are being adequately reviewed. In this regard, we recognize that the Standing Committee on Estimates is neither expected nor able to consider the estimates of all ministries and offices each year. While we also recognize that a procedure may be developed wherein each of the estimates will be considered on a regular basis, we believe that such a level and frequency of review will not be sufficient to enable our Committee to fulfil its mandate. At the same time, while we appreciate that the Standing Committee on Estimates may possess an expertise in the procedure of reviewing estimates, we believe this Committee's specialized knowledge of the Ombudsman's operations provides it with an equally valuable and unique expertise to review the estimates of the Ombudsman. We therefore believe that it would be appropriate for the estimates of the Ombudsman to be excepted from those estimates to be considered by the Standing Committee on Estimates, and that they instead be referred to the Standing Committee on the Ombudsman. We therefore recommend:

- 5. That the Standing Orders be amended to provide that the estimates of the Ombudsman are not to be referred to the Standing Committee on Estimates as they are at present, but are instead to be referred to the Standing Committee on the Ombudsman which shall review them from time to time as they**

become available, and report on them to the Legislature and make such recommendations as the Committee deems appropriate.

(b) Annual Audit Conducted by the Provincial Auditor

The *Ombudsman Act* provides as follows:

S. 10 The accounts and financial transactions of the office of the Ombudsman shall be audited annually by the Provincial Auditor.

The purpose and value of audits are expressed in the Provincial Auditor's description of the primary and secondary goals of his or her mandate. These are:

- to assist the Legislature in holding the Government and its administrators accountable by reporting to the Legislature on the quality of the administration's stewardship of public funds; and
- to assist Deputy Ministers/agency heads in holding their administrations accountable by reporting to them on the quality of the ministries'/agencies' stewardship of public funds.

There are different types of audits which may be carried out, varying in terms of the scope of financial activities which are examined. The most rigorous type of audit is referred to as a "value for money" audit and requires the auditor "to report on any cases observed where money was spent without due regard to economy or efficiency, or where appropriate procedures were not taken to measure the effectiveness of programs." A "compliance" audit involves an "assessment of whether transactions and other aspects of operations are in compliance with legislative and administrative requirements." Finally, an "attest (financial)" audit involves an opinion as to "whether the operations and financial position of the entity have been fairly presented in compliance with the entity's stated accounting policies."

As noted above, the *Ombudsman Act* provides that the Office of the Ombudsman is to be audited annually. The audits which have been conducted of the

Ombudsman's office since its creation in 1975 have primarily been attest audits, although there have on occasion been compliance and value for money components. However, to the extent the Provincial Auditor has undertaken any value for money assessments, these occurred primarily prior to 1984.

We have some concern about the length of time that has passed since any form of value for money audit of the Ombudsman has been undertaken by the Provincial Auditor. Given the important functions such audits are intended to perform and the role they can play in improving the service provided by the organization involved, we believe that there would be considerable value in undertaking such audits on a regular basis. This view is borne out, we believe, by the fact that the Provincial Auditor considers all major ministry programs for audit over a regular five-year period and such audits are primarily of a value for money character. In contrast, for agencies such as the Ombudsman there is no guarantee of a regular review of a value for money nature, although the Provincial Auditor does select approximately six agencies per year for which some degree of value for money audit will be carried out. However, since there are approximately 60 such agencies the likely frequency with which any agency will be reviewed would be approximately every 10 years.

We are aware that the Provincial Auditor has limited resources and that this affects the frequency with which such audits can be carried out. We also recognize that if our Committee believes that there is a need for such an audit it has a responsibility to bring this to the auditor's attention. In this respect, we believe that too long a period has passed without a detailed assessment of the economy or efficiency with which money is spent in the Office of the Ombudsman. We believe therefore that it would be appropriate at this stage for a value for money audit to be undertaken of the Office of the Ombudsman. We therefore recommend:

6. **That the Provincial Auditor conduct a value for money audit of the operations of the Office of the Ombudsman.**

PART VIII: DEVELOPMENTS IN THE INTERPRETATION OF THE OMBUDSMAN'S MANDATE

(a) Role of the Ombudsman After Making a Report to the Legislature

The Ombudsman's power to make a report to the Legislature, in circumstances where a governmental organization has not adequately responded to her recommendations, has long been considered a valuable tool in bringing pressure to bear on the government to respond to the recommendation. To make this tool more effective, such reports are referred to our Committee which reviews the Ombudsman's recommendations and the governmental organization's response, and then makes recommendations to the Assembly. In the past, during and after the Committee's review, the Ombudsman continued to be involved in monitoring and assessing any developments in the governmental organization's position, and in communicating with the complainant and the Committee in this regard. This typically was necessary where, for example, a governmental organization had refused an Ombudsman's recommendation to change a policy or procedure, but then, after appearing before the Committee, agreed to reconsider its policy. In such instances the Ombudsman would monitor the governments review of its policy and in some cases comment to the Committee on whether the ultimate response was adequate.

While this is the role previous Ombudsmen have played in these circumstances, the present Ombudsman has taken the position that once she has submitted a report to the Legislature she has both fulfilled her responsibilities under the Act and exhausted her powers. In particular, she has discontinued the practice which previous Ombudsmen undertook of monitoring cases after they had reported to the Legislature. This has led to the elimination from her annual reports of the tables which showed the status of all cases in which governmental organizations had not yet implemented the recommendations of the Ombudsman and the Committee. This was also the basis on which she refused to provide information which the Committee had requested concerning the status of certain outstanding cases.

We are concerned with the Ombudsman's discontinuance of these practices and the implications this has for the effectiveness of the Ombudsman process. In our view, there must be some procedure for monitoring the government's response to recommendations of the Ombudsman and the Committee. Without such a procedure, the government can use the passage of time to avoid the public scrutiny which the reviews of the Ombudsman and the Committee bring to bear on governmental practices. This, we believe, would both lessen the likelihood of a governmental organization changing a practice or decision which is found to be unreasonable, and undercut the ability of the Ombudsman to obtain adequate responses in future instances.

We also believe that the Ombudsman is the person best able to fulfil this responsibility. In this respect, the Ombudsman is both primarily responsible for investigating the actions of government and has the best institutional ability and resources to perform these functions. For these reasons, we believe it is a natural and necessary role for the Ombudsman to continue to monitor and assess actions taken by governments in response to his or her recommendations, whether they occur before or after a report has been made to the Legislature. This view was held by previous Ombudsmen and, we believe, is the best way to ensure that the objects of the *Ombudsman Act* are achieved.

While we believe that the Ombudsman should perform this role, there is the further question of whether the Ombudsman is correct in stating that the *Ombudsman Act* does not empower her to perform it. In this respect, the Act does not expressly address the role to be played by the Ombudsman following the making of a report to the Legislature. Therefore, if the Ombudsman does have the power to continue to involve himself or herself in a matter once a report has been made to the Legislature, it would need to be because she has an implicit power to do so.

While the courts have not addressed this specific question, they have, in the context of a decision by the Ombudsman to reinvestigate a case, considered the

more general question of whether he or she has any power to act after a report has been delivered to the Legislature. In the case in question, *Re Ombudsman of Ont. and the Queen in Right of Ont.* (1980) 117 D.L.R. (3d) 613 (O.C.A.), aff'g (1979) 26 O.R. (2d) 434 (H.C.J.), the Ministry of Housing, in resisting such an investigation, argued precisely that the Ombudsman had no further power to act once a report had been submitted to the Legislature. In considering the Ministry's position the lower court judge, Evans, C.J.H.C., commented that a "... problem created by limiting the Ombudsman's powers in this way arises where relevant evidence cannot reasonably be detected until a later date or when there has been a change of circumstances which would affect the conclusions and recommendations of the Ombudsman." Later Evans, C.J.H.C. concludes:

I have come to the conclusion that the Ombudsman implicitly has a continuous function and has the power to further investigate subject to certain restrictions. In considering the provisions of the Ombudsman Act, 1975, I have been driven to this conclusion by the nature of his function, the broad discretionary powers to investigate and to report and the freedom granted to the Ombudsman to act of his own motion.

This decision was upheld in the Court of Appeal. The Court of Appeal agreed that the Ombudsman had the power to reinvestigate a case, and was particularly careful not to place artificial constraints on when such an investigation could be undertaken.

While both the decisions of the lower court and the Court of Appeal in this case focus on the Ombudsman's power to reinvestigate a case, in doing so they clearly establish that the Ombudsman does have some implicit power to act after he or she has reported to the Legislature. In addition, we believe the Court of Appeal is particularly careful not to artificially limit the scope of those powers.

Both these aspects of the decisions are important, we believe, in considering the question of whether the Ombudsman has the power to continue to monitor cases after she has reported to the Legislature. First of all, these decisions determine

that the Ombudsman's powers do not in fact end once he or she has reported to the Legislature. This at least creates the possibility that the Ombudsman has the power to perform the monitoring role we discussed earlier. More importantly, the Court of Appeal decision in particular suggests that a flexible, practical approach should be taken to interpreting the provisions of the *Ombudsman Act*. Such an approach has in fact been taken by previous Ombudsman, and in some instances, by the present Ombudsman, as they have found that it has been necessary to stray outside the strict terms of their mandate and exercise implied powers to effectively fulfil their functions. As we have also indicated earlier, we do not question the propriety of this approach since we believe it is consistent with the Supreme Court of Canada's direction that Ombudsman legislation receive a "broad, purposive interpretation consistent with the unique role the Ombudsman is intended to play."

If such an approach is taken to the issue in question, we believe it is open and reasonable for an Ombudsman, and this Committee, to interpret the Ombudsman's powers such that he or she would implicitly have the power to continue to monitor developments with respect to the implementation of the recommendations of the Ombudsman and the Committee. Such an interpretation of the Ombudsman's powers would more fully give effect to the purpose of reporting to the Legislature, which we believe is to provide a mechanism to bring to bear additional pressure on a governmental organization to implement the Ombudsman's recommendation.

In summary, the Committee is convinced that it is a natural and necessary function for the Ombudsman to monitor the actions taken by a governmental organization in response to his or her recommendations, whether or not they occur after a report is delivered to the Legislature. We believe it is also a part of this function to continue to assess the appropriateness of the government's response and, where it might be useful, to bring those developments to the attention of the Committee, along with the Ombudsman's comments. We also believe that the Ombudsman has the power to act in this way. We believe that this power is implicit and follows both from the decisions of the lower court and the Court of Appeal in the

case of *Re Ombudsman of Ont. and The Queen in Right of Ontario*, and from giving the Act a broad and purposive interpretation.

We have given serious consideration to how best to implement our conclusions. In this respect, we believe that the actions in question are ones which each Ombudsman is not only entitled to perform but, for the reasons we have given, should perform. We believe therefore that these directions should be embodied in rules made under s. 15 of the *Ombudsman Act*, which empowers the Assembly to make "general rules for the guidance of the Ombudsman in the exercise of his or her functions under this Act." By virtue of that section, such rules are also deemed to be regulations for the purposes of the *Regulations Act*. We therefore recommend as follows:

7. That the following be established as a rule under s. 15 of the *Ombudsman Act*:

- S. 9**
- (1) Following the submission of a report to the Assembly pursuant to s. 21(4) of the Act, the Ombudsman shall continue to monitor the governmental organization's response to his or her recommendations and to recommendations made by the Standing Committee on the Ombudsman in relation to the Ombudsman's report.
- (2) For the purposes of ss. (1), such monitoring shall include continuing to assess the adequacy of the governmental organization's further response, bringing developments in this respect to the attention of the Standing Committee on the Ombudsman, and reporting in the Ombudsman's Annual Reports on the status of all such recommendations outstanding.

PART IX: COMMUNICATIONS FROM MEMBERS OF THE PUBLIC

The Committee has, since its creation, received and considered communications from the public concerning the operations of the Ombudsman. It does this through its Sub-committee on Communications from the Public which is directed to review and respond to these communications.

The communications received primarily concern the Ombudsman's investigation of an individual's complaint, and question either the Ombudsman's conclusions or handling of the investigation. The Sub-committee has taken its mandate in reviewing these complaints to be to determine whether the treatment and investigation of the complaint by the Ombudsman was full, fair and adequate in the circumstances. The Sub-committee does not review the correctness or reasonableness of the Ombudsman's decisions, and in that sense does not act as a "court of appeal" from the Ombudsman. Its primary interest is therefore in the procedural fairness of the investigation. If the Sub-committee determines that the Ombudsman's investigation was incomplete or improper then it may ask the Ombudsman to address its concerns.

The Committee continues to believe that this is a valuable role for it to perform. We believe it is important that individuals have some avenue to voice their concerns about the fairness of the Ombudsman's investigation. In the past the Ombudsman has seen this as a valuable way to respond to concerns about the service provided by his or her office. This, we believe, was in part a recognition that like the organizations it investigates, the Office of the Ombudsman is an institution with the same potential for maladministration. As the body responsible for overseeing the affairs of the Ombudsman, the Committee has therefore adopted the reviewing of complaints as an important part of its responsibilities. We will continue to perform this role in order to assist the Ombudsman in providing the public with the highest quality service possible.

(a) Developments in the Committee's Procedures for Reviewing Communications from the Public

Since the Committee's last report it has been necessary to address a number of issues related to Committee procedures with respect to its review of communications from the public. These have included the following:

- The procedures concerning the release of documents by the Ombudsman to the Committee.
- The disclosure of information to the Committee concerning the Ombudsman's investigation of complaints.

The issues related to each of these are addressed in turn in this section of the Report.

(i) Release of Documents by the Ombudsman to the Committee

The Committee's procedures, as set out in its *Twelfth Report (1984)*, and confirmed with revisions in its *Seventeenth Report (1989)*, express the following principle with respect to the sharing of documentation between the Ombudsman and the Committee:

Except in very unusual circumstances, all information, correspondence and reports exchanged between the communicant and the Committee and between the Ombudsman and the communicant are shared between the Committee and the Ombudsman. Because of the confidentiality required by the Ombudsman by his Act, documents exchanged between Ombudsman and persons and organizations other than complainant are not released to the Committee, except as they may be quoted or cited in the Ombudsman's report to the complainant.

The procedures also provide that the Ombudsman may require the complainant's written authorization before providing the documents to the Committee which had been exchanged between the Ombudsman and the communicant.

In June and July, 1990, the Clerk of the Committee wrote to the Ombudsman to request documentation in relation to two matters which were being considered by the Committee. In both instances the complainant's written authorization to provide the documents was provided. The present Ombudsman responded to these requests in August, 1990, stating that the *Ombudsman Act* did not permit her to forward the documentation requested to the Committee. In taking this position she relied particularly on s. 12 of the Act which provides that the Ombudsman shall not "disclose any information received by him or her as Ombudsman," subject to certain exceptions related to the preparation of her reports.

The Committee met in April, 1991 to consider the Ombudsman's refusal to release the documents requested. The Committee had serious concerns with respect to the Ombudsman's interpretation of her oath of secrecy as expressed in s. 12. Nonetheless, the Committee noted that it would be possible to obtain all of the documentation required directly from the complainant, since those documents would either be in his or her possession or could be obtained by him or her from the Ombudsman directly. This approach had the advantage of enabling the Committee to proceed immediately with a number of complaints which were outstanding and whose consideration had been delayed by these developments.

The Committee adopted this approach and amended its procedures to provide that in the future it would obtain the necessary documents directly from the complainant. Nonetheless, the Committee continues to believe that the Ombudsman's interpretation of the Act in this respect is questionable and presents an unnecessary obstacle to the Committee in its review of complaints from the public.

(ii) Disclosure of Information Concerning the Ombudsman's Investigation

As indicated above, the Committee's primary purpose in reviewing complaints from the public is to examine the Ombudsman's handling of the investigation. In completing this review it is often necessary for the Sub-committee to obtain further information from the Ombudsman and to request explanations for certain actions taken by her. The types of information typically requested are:

- Information concerning the Ombudsman's handling of a particular investigation. For example, in a case involving a 2 1/2 year delay by the Ombudsman, the Ombudsman was asked whether there was anything exceptional which contributed to the delay in question.
- Information clarifying the Ombudsman's conclusions in her report to a complainant. For example, in one case where it was not clear whether the Ombudsman had addressed an important issue, the Committee asked her to clarify her findings and to indicate her reasons in this regard.
- Information concerning the Ombudsman's general investigative and reporting procedures.

The Committee has recently encountered problems in obtaining information from the Ombudsman. While the Ombudsman is prepared to provide information which concerns her general investigative and reporting procedures, she has taken the position that she is prevented by the Act from commenting on particular cases she has investigated. This has led to her refusal to provide information with respect to a number of questions the Sub-committee has asked in relation to complaints it was investigating. The questions the Ombudsman has refused to answer are of the first two types noted above - questions concerning her handling of an investigation, and questions asking clarification of aspects of her reports to complainants.

The Committee has reviewed the Ombudsman's refusal to provide the information in question. While the Committee shares the Ombudsman's view that her oath of secrecy is important to the achievement of her work, we also believe that its scope is not unlimited. We believe that in defining the scope of the oath of secrecy, and

therefore in determining what information may be disclosed by the Ombudsman, consideration should be given to whether disclosure would be consistent with achieving the purposes of the oath of secrecy, as well as the terms of the *Ombudsman Act*.

The purposes of the oath of secrecy, as we have identified them, are on the one hand, to enable the Ombudsman to obtain information by assuring complainants of her strict confidentiality requirements, and on the other, to provide a balance against the Ombudsman's extensive investigative powers. We have considered the impact the disclosure of the information we have requested would have on the achievement of these purposes. The types of information which we have requested, as noted above, concern the Ombudsman's handling of an investigation and clarification of the content of the report she has provided to a complainant. We believe that disclosure of these types of information would not diminish the purposes of the Ombudsman's oath of secrecy.

In particular, in our view disclosure of the first type of information, which concerns the Ombudsman's own actions - for example, the reasons for the Ombudsman's delay in processing a complaint - would only affect the Ombudsman. It would not, in most instances, have an impact on anyone who has provided information to her. Similarly, disclosing to the Committee information which clarifies the Ombudsman's report to a complainant who has asked the Committee to examine his or her complaint, and who has provided the Committee with a copy of the report, would not prejudice anyone's confidentiality expectations. We do recognize that without the complainant's authorization, it would quite likely be inappropriate for the Ombudsman to either provide the Committee with a copy of an individual's report, or to clarify its contents. This we believe would be the case because the Act does not appear to contemplate these reports being made public. However, as we have indicated, we believe that obtaining the complainant's authorization to provide the information would remove the Ombudsman's confidentiality responsibility.

We also believe that the actual language of s. 12 does not include, and therefore does not prevent the Ombudsman from disclosing, information concerning the actions of the Ombudsman. Section 12 provides that the Ombudsman must not "disclose any information received by him or her as Ombudsman." In our view, the term "information received" was intended to cover information and documents which the Ombudsman acquires or receives in the course of her investigation and was neither intended nor reasonably interpreted would include information about the Ombudsman's handling of an investigation.

This interpretation of s. 12 would also seem to be consistent with other provisions of the Act which require the Assembly to review the affairs of the Office of the Ombudsman (s. 11) and to make rules for the guidance of the Ombudsman in the exercise of her functions (s. 15). To fulfil these responsibilities the Assembly, through the Committee, requires information with respect to the Ombudsman's actions or omissions in particular cases in order to properly assess her work and to make reasonably informed recommendations.

In conclusion, we believe that neither the language nor the purpose of the Ombudsman's oath of secrecy as found in s. 12 would prevent the Ombudsman from disclosing information which concerns the Ombudsman's handling of a particular case. We therefore believe that it is information which may be disclosed by the Ombudsman. We recognize that information related to clarifying a complainant's report might well fall within the scope of the Ombudsman's oath of secrecy. However, we believe that where the complainant affected has asked the Committee to examine his or her complaint and has provided the Committee with a copy of his or her report, then disclosure of such information would not be inconsistent with the purposes of the oath of secrecy. In our view, given this fact, and so long as the Ombudsman is provided with the complainant's authorization to provide such information, disclosure of this information might also be permitted.

Although we believe the information in question may be disclosed by the Ombudsman, we recognize that she disagrees with our position. In light of this

we believe it would be inappropriate to direct that she provide information to the Committee which she believes she is prevented from disclosing. We have therefore considered the option of directing the Ombudsman, in appropriate cases, to provide the information the Committee requires directly to the complainant, who would pass it on to us. However, while this may address the Committee's immediate problem in assessing and reaching decisions on the complaints under review, we believe the Ombudsman's interpretation of s. 12 presents broader problems with respect to the Committee's fulfilment of its responsibilities which must be addressed.

We therefore believe that a court application to determine the scope of the Ombudsman's oath of secrecy should be brought. We have raised this possibility with the Ombudsman. In this respect, she responded as follows:

I am quite satisfied with the interpretation which I am giving to the meaning of s. 13 (*now s. 12*) and see no need to have any further clarification of what seems to me to be quite clear, appropriate and routine internationally.

For the reasons which we have expressed above, we disagree with the Ombudsman's view that there is no need to clarify s. 12. We believe that her interpretation of the Act is questionable and more importantly will continue to prevent the Committee from fulfilling its responsibilities under the *Ombudsman Act*.

Accordingly, the Committee recommends as follows:

8. That the Ombudsman bring an application pursuant to s. 14(5) of the *Ombudsman Act* to clarify the meaning of s. 12 and in particular to determine whether it prevents her from:
 - (a) releasing documents to the Committee which were exchanged between the Ombudsman and the complainant and with respect to which the complainant's written authorization to release the documents has been obtained;

- (b) disclosing information to the Committee concerning her handling of an investigation; and
- (c) disclosing information to the Committee clarifying the content of her report to a complainant where the complainant has authorized the Committee to make enquiries on his or her behalf, and has authorized the Ombudsman to release such information to the Committee.

As we have stated above, we believe these documents and this information should be made available to the Committee. Therefore, in the event that such an application determines that the Ombudsman is prevented by the Act from providing the documents and information noted then we recommend as follows:

9. That consideration be given to amending s. 12 of the *Ombudsman Act* to provide that the Ombudsman is not prevented from disclosing the information referred to in Recommendation 8 above, and that this form part of a more general review of the *Ombudsman Act* to be conducted by this Committee.

(b) Outcome of the Committee's Review of Particular Complaints

As we have noted above, the Committee, through its Sub-committee on Communications from the Public, receives and considers complaints from the public. In reviewing these complaints the Sub-committee will examine the Ombudsman's handling of an investigation, but will not as a rule review the correctness or reasonableness of the Ombudsman's decisions. In most instances, the Committee finds that in fact the Ombudsman has conducted the investigation properly. However, in some instances the Committee will recommend that the Ombudsman take some action. This section of the report provides a summary of the Sub-committee's activities and recommendations with respect to its review of complaints it has received since the Committee's last report, and notes those instances in which the Committee has adopted a Sub-committee recommendation that some further action be taken by the Ombudsman.

In addition to identifying problems in the Ombudsman's investigation of particular cases, the Committee also watches general trends in the complaints that it receives. In this respect, the Committee notes that two themes which recur in the complaints considered in this report are those of excess delay in the review of complaints, and lack of clarity in the Ombudsman's reporting of her conclusions. While the number of complaints received by the Committee presents a limited basis on which to assess the systemic nature of these problems, we trust that the Ombudsman will nonetheless consider these problems carefully.

The Sub-committee on Communications from the Public has reviewed nine complaints from the public since the Committee's last report. In three of the cases, the Sub-committee considered the criticisms made about the Ombudsman's handling of the investigation and concluded that the Ombudsman's investigation was complete and fair. In each of the other cases, following a review of the complaint the Sub-committee recommended that some further action be taken by the Ombudsman.

(i) Ministry of Community and Social Services - Mrs. H

There was one aspect of Mrs. H's criticisms of the Ombudsman's handling of her investigation which the Sub-committee determined merited further investigation. This concerned the period of approximately two and one-half years which passed from the receipt of Mrs. H's complaint in July, 1988 to the completion of the Ombudsman's final report on November 6, 1990. The Sub-committee was naturally concerned about the length of time it took to consider this complaint. It therefore wrote to the Ombudsman asking, among other things, whether there was anything exceptional which contributed to the delay in processing Mrs. H's case. The Ombudsman did not respond to this question since she took the position that she was prevented from doing so by her oath of secrecy. For the reasons which we have indicated earlier in this report, we disagree with the position taken by the Ombudsman in this respect.

The Sub-committee believes that a delay of two and one-half years in processing a complaint seems excessive and requires some explanation. Of particular concern is the apparent inactivity between November 22, 1989, when the Ombudsman wrote to Mrs. H to indicate the preliminary results of her investigation, and November 6, 1990 when the Ombudsman provided her final report on the matter to Mrs. H. As a result, the Sub-committee has concluded that the Ombudsman should be directed to convey to Mrs. H the reasons for the delay in addressing her complaint.

In this respect, the Committee adopts the following Sub-committee recommendation:

10. **That the Ombudsman inform Mrs. H, within 30 days of the tabling of this report, of the reasons for the delay in processing her complaint and, in particular, convey to her the reasons for the delay during the period from November 22, 1989 to November 6, 1990.**

The Sub-committee will continue to monitor this matter and will await a response from Mrs. H as to the explanation of the delay provided by the Ombudsman.

(ii) Board of Examiners in Psychology - Mr. V

Mr. V made two criticisms of the Ombudsman's investigation of his complaint which the Sub-committee believed merited further action.

1. The first concerned whether the Ombudsman had considered all relevant issues in assessing the reasonableness of the Board's review of Mr. V's complaints concerning a psychologist. In this respect, Mr. V noted that the Board had, in assessing his complaint, relied on the following policy:

Where a person submits more than one complaint against a psychologist and the Committee investigates the first complaint and finds it to be without merit and then finds the second complaint to

be without merit, the Committee may decide that there are no grounds for further investigation and no reasons to ask the psychologist for further information, if it received yet another complaint of the same type.

Mr. V's criticism was that while the Ombudsman reviewed the Board's compliance with this procedure, she did not, in her report, address the reasonableness of the procedure itself.

The Sub-committee reviewed the Ombudsman's report and agreed that the Ombudsman did not appear to have directly addressed the reasonableness of this policy. The Sub-committee therefore wrote to the Ombudsman asking that she provide clarification of her conclusion as to the reasonableness of the Board of Examiners' policy, and requesting that she provide the reasons for her decision in this regard. The Ombudsman did not respond to this question since she took the position that she was prevented from doing so by her oath of secrecy. As we have indicated, we disagree with her position in this regard.

Without the information requested the Sub-committee is unable to assess whether the Ombudsman complied with her mandate in these circumstances. The Committee therefore adopts the following Sub-committee recommendation:

- 11. That the Ombudsman indicate to Mr. V, within 30 days of the tabling of this report, whether she considered the reasonableness of the Board's policy, and if so, provide to Mr. V her conclusions and reasons in this regard.**
2. A second concern raised by Mr. V concerned the Ombudsman's response to his criticism that no appeal mechanism existed from decisions of the Board of Examiners in Psychology to the Health Disciplines Board. The Ombudsman's response in this respect was as follows:

I am not in a position to comment on the appropriateness of the *Health Disciplines Act* in the circumstances, nor is it within my mandate to make conclusions regarding the governance of health care

professionals under the various Acts administered by the Ministry of Health.

The Sub-committee was concerned with this statement and the limits on the Ombudsman's jurisdiction which it suggested. In particular, this statement raised the question of whether the Ombudsman felt that it was within her jurisdiction to identify and make recommendations with respect to inadequacies in the law, such as, in this case, the absence of an appeal mechanism. It therefore wrote to ask the Ombudsman in what circumstances she will recommend amendments in the law and direct a governmental organization to take steps toward the implementation of such amendments. In response, the Ombudsman wrote that she will do so in a range of circumstances, most commonly when she finds as a result of an investigation that a law operates unfairly or adversely impacts on an individual or group of individuals.

Given the Ombudsman's response, the Sub-committee believes it is unclear why she decided that it was inappropriate to comment on the *Health Disciplines Act* in these circumstances. The Committee therefore adopts the following Sub-committee recommendation:

12. **That the Ombudsman convey to Mr. V, within 30 days of the tabling of this report, her reasons for deciding that it was inappropriate to comment on the failure of the *Health Disciplines Act* to provide for an appeal mechanism from decisions of the Board of Examiners in Psychology.**

The Sub-committee will monitor this matter and will await a reply from Mr. V as to the Ombudsman's response to the Committee's recommendations. In a related development, the Committee notes that the recently enacted *Psychology Act, 1991* and the *Regulated Health Professions Act, 1991* now provide for an appeal mechanism from decisions of the Board of Examiners in Psychology (now the College of Psychologists of Ontario) and have therefore addressed Mr. V's concerns in this last respect. The Sub-committee has advised Mr. V of these developments. Nonetheless, the Committee remains concerned with the

Ombudsman's interpretation of her mandate in these circumstances and therefore will review the Ombudsman's reply when it is received.

(iii) Ministry of Correctional Services - Mr. VV

There are two aspects of Mr. VV's case which the Sub-committee believes merit further action.

1. The first relates to the vagueness of the Ombudsman's report to the complainant. In this respect, Mr. VV's complaint had concerned the manner in which the Ministry where he worked managed a reclassification process which had eliminated the complainant's position and created a new position. This reclassification affected employees in different regions of the province. The process followed for reclassifying employees in the complainant's position varied from region to region. In one of the regions, all employees in the complainant's classification were automatically reclassified to the new position. However, in the complainant's region he was required to either apply for and sit an examination for the newly created position, or be demoted. Mr. VV believed that treating the regions differently was unfair and therefore refused to sit the examination, as a result of which he was demoted. He complained to the Ombudsman arguing that his employer's unequal treatment of employees was unreasonable and that he was therefore justified in refusing to sit the examination. He requested that he be reclassified to the new position by way of redress.

The Ombudsman reviewed his complaint. She considered separately the reasonableness of Mr. VV's demotion and the reasonableness of the reclassification process. With respect to the reclassification process itself, the Ombudsman stated that it was unreasonable to impose different requirements on similarly situated staff for the same positions. She therefore concluded that the inconsistencies and variations in staff treatment related to the reclassification process in question were unreasonable. In consequence, she stated that she had taken steps to ensure that such difficulties were addressed by the Ministry. She

added that in response to her concerns the Ministry had recognized that, regional autonomy notwithstanding, staff should be treated consistently and fairly if in similar situations.

While the Ombudsman concluded that the reclassification process was unreasonable, she decided that Mr. VV's demotion had, nonetheless, been reasonable. In this respect, she stated that even if the reclassification process was itself unreasonable, it was not unreasonable to expect that the complainant might have participated in the competition despite his objections.

While it is not within the Sub-committee's mandate to review the Ombudsman's conclusion that Mr. VV's demotion was reasonable, the Sub-committee is concerned with the vagueness of the Ombudsman's conclusions with respect to the reasonableness of the reclassification process. In this respect, the Sub-committee felt that the Ombudsman should have indicated what she believed would have been a reasonable approach to the reclassification process, and should have indicated the specific steps that she had recommended the Ministry take to ensure that the inconsistencies in question are not repeated. As a result, the Sub-committee wrote to the Ombudsman to ask that she provide this information. She refused to do so for the reasons stated earlier in this report.

We agree with the Sub-committee that in these circumstances the complainant should have the benefit of a full and complete statement of the Ombudsman's conclusions. The Committee therefore adopts the following Sub-committee recommendation:

13. **That the Ombudsman inform Mr. VV, within 30 days of the tabling of this report, of her conclusions as to what she believed would have been a reasonable approach to the reclassification process, and of the specific steps that she recommended the Ministry take to ensure that the inconsistencies in question are not repeated.**

2. The second aspect of Mr. VV's case which merited further investigation was the period of time it took to consider his complaint. A period of approximately two years passed from the receipt of Mr. VV's complaint in March, 1989 to the completion of the final report in March, 1991. The Sub-committee was concerned at the apparent delay in considering Mr. VV's complaint and therefore wrote to the Ombudsman asking, among other things, whether there was anything exceptional which contributed to the delay in processing his case, and in particular, whether there was any explanation for the delay from August 28, 1989 until October, 1990, a period during which there seemed to be little activity in the file. The Ombudsman did not respond to this question since she took the position that she was prevented from doing so by her oath of secrecy. For the reasons which we have indicated earlier we disagree with the position taken by the Ombudsman in this respect.

The Sub-committee believes that a delay of two years in processing a complaint seems excessive and requires some explanation. Of particular concern is the apparent delay between August 28, 1989 and October, 1990 when little activity appears to have taken place. As a result, the Sub-committee has concluded that the Ombudsman should be directed to convey to Mr. VV the reasons for the delay in addressing his complaint.

The Committee therefore adopts the following Sub-committee recommendation:

14. **That the Ombudsman inform Mr. VV, within 30 days of the tabling of this report, of the reasons for the delay in processing his complaint and, in particular, convey to him the reasons for the delay during the period from August 28, 1989 to October, 1990.**

The Sub-committee will monitor this matter and will await a reply from Mr. VV as to the Ombudsman's response to the Committee's recommendations.

(iv) Workers' Compensation Appeals Tribunal - Mr. S

There is one aspect of Mr. S's case which the Sub-committee believes merits further action. It concerns the Ombudsman's response to Mr. S's request that his case be reopened. The Ombudsman concluded that she did not, in the circumstances, have the authority to reinvestigate Mr. S's case. In reaching this conclusion, the Ombudsman relied on the following statement of her authority:

The Ontario Court of Appeal in the case of *Re Ombudsman and the Queen in Right of Ontario* (1980), 117 D.L.R. (3d) 613, concluded that the Ombudsman's power to re-investigate should be limited to an investigation of evidence not previously known to him/her whether or not it could have been previously discovered.

The Sub-committee has reviewed this statement of the Ombudsman's authority to reinvestigate and is of the view that it does not accurately describe the scope of her power to reinvestigate. The Sub-committee noted, in this respect, that while the statement quoted may reflect the decision of the lower court in the case referred to, the Court of Appeal took a more flexible approach to this question. In this respect, Arnup J.A., speaking on behalf of the Court of Appeal, stated:

I repeat in this context what I have said earlier, that it would not be appropriate to lay down in definitive terms the limits of the exercise of discretion of the Ombudsman in all circumstances as to when he can and when he cannot investigate a matter in respect of which some investigation has already been made. We do not think that the further investigation of the Ombudsman is precluded by any lack of "new evidence" in the sense in which that term should be used when considering the activities of the Ombudsman.

The Court therefore does not place fixed limits on when the Ombudsman may reinvestigate a case, and expressly states that a further investigation will not be precluded by a lack of "new evidence." Accordingly, the Court's decision does

not appear to limit the Ombudsman's power to re-investigate in the manner in which the Ombudsman has indicated in her response to Mr. S.

The Sub-committee raised its concerns in this regard with the Ombudsman who has agreed that she has a broader discretion to re-investigate a matter than was suggested in her response to Mr. S. While the Sub-committee is satisfied with the Ombudsman's response, it remains concerned with the fact that at the time she responded to Mr. S's request she relied on an inaccurate statement of her authority. While this may not have affected her ultimate decision to reopen his case, the Sub-committee believes that it would be appropriate for the Ombudsman to reconsider Mr. S's request.

We agree with the Sub-committee's conclusions and therefore adopt the following Sub-committee recommendation:

- 15. That the Ombudsman reconsider Mr. S's request that the Ombudsman reopen her investigation into his complaint concerning the Workers' Compensation Appeals Tribunal.**

The Sub-committee will monitor this matter and will await a reply from Mr. S as to the Ombudsman's response to the Committee's recommendation.

(v) Ministry of the Attorney General - Mr. A

The aspect of the Ombudsman's investigation of Mr. A's case which requires further action concerns the manner in which the previous Ombudsman followed up the recommendations which he made in his report.

The previous Ombudsman, in his report to Mr. A, commented as follows:

Accordingly, I have made a recommendation to the Attorney General that he consider implementing the recommendations of the Professional Organizations Committee with respect to the establishment of a

Lay Observer to consider complaints from members of the public about the manner in which the Law Society handles complaints about lawyers. My recommendation is presently under review at the Ministry.

Mr. A's criticism was that he was never informed by the Ombudsman of the outcome of this review and of whether any steps taken by the Ministry were satisfactory to the Ombudsman.

The Sub-committee wrote to the Ombudsman asking that she provide information with respect to the result of the Ministry's review in this instance and the Ombudsman's position as to whether the Ministry's response was adequate and appropriate. The Sub-committee also asked the Ombudsman to provide information with respect to her policy for following up final reports where the Ministry has not fully responded to the report at the time it is delivered to the complainant. For the reasons discussed earlier, the Ombudsman refused to provide the information which concerned the Ministry's response in these particular circumstances. However, she did provide information with respect to her policy on following up cases more generally, which she indicated includes monitoring the governmental organization's actions and requesting a status report after a reasonable period of time. She added that in essence the matter is not closed until the Ombudsman reviews the governmental organization's actions in implementing the recommendation.

Mr. A has indicated to the Sub-committee that he has not been informed of the Ministry's ultimate response to the Ombudsman's recommendation. The Sub-committee believes that, in accordance with the Ombudsman's policy for following up cases, this information should be provided to Mr. A. The Committee agrees and therefore adopts the following Sub-committee recommendation:

- 16. That the Ombudsman convey to Mr. A, within 30 days of the tabling of this report, the result of the Ministry's review of the Ombudsman's recommendation and the Ombudsman's position as to whether the Ministry's response was adequate and appropriate.**

The Sub-committee will monitor this matter and will await a reply from Mr. A as to the Ombudsman's response to the Committee's recommendation.

(vi) Ontario Energy Corporation - Mr. R.S.

This complex matter concerned a series of agreements entered into between Mr. R.S. and the Ontario Energy Ventures Limited (OEV), a former wholly-owned subsidiary of the Ontario Energy Corporation (OEC). The agreements related to the expansion of Mr. R.S.'s business from research and development of energy related products to the marketing of those products. In particular, the agreements provided for OEV's investment of venture capital in the project and OEV's later involvement in the management of the projects themselves. Mr. R.S. claimed that, in the course of their dealings, the OEV acted unreasonably in a number of ways.

There are three aspects of Mr. R.S.'s case which require further action. They relate to Mr. R.S.'s criticisms that the Ombudsman failed to consider relevant issues, that she failed to contact material witnesses, and that the delay in completing the investigation of the complaint was excessive.

1. One of the issues which Mr. R.S. believes the Ombudsman failed to assess was the reasonableness of the actions of the OEV while acting on the board of "Sales" at a time when the OEV was in a minority position on that Board. Of particular concern was the failure of the OEV to take steps to stop certain improper activities carried out by a Mr. P.S., the President and Chief Executive Officer of "Sales," and a former officer of the OEV. In her report the Ombudsman states that "because of OEV's minority position on that Board, the matter of the Board sanctioning P.S.'s actions is outside of my jurisdiction." While the Sub-committee does not disagree with the Ombudsman's conclusion that the Board's actions per se are outside her jurisdiction in these circumstances, the more pertinent question is whether the actions of the OEV while acting on that Board are reviewable by her. This is of great importance because the votes the

OEV cast on the Board could have ultimately determined the actions to be taken by that Board in sanctioning Mr. P.S. In this respect, the Ombudsman's report does not appear to directly address the reasonableness of the OEV's actions while participating on the Board in these circumstances, or the impact its actions had on Mr. R.S.

As a result of the Sub-committee's concern with the Ombudsman's apparent failure to consider this issue, it wrote to the Ombudsman to ask her to inform Mr. R.S. as to whether she believed the actions of the OEV in these circumstances were within her jurisdiction to review, and if so, of her conclusions as to the reasonableness of the actions taken by the OEV in the circumstances in question. The Ombudsman refused to provide this information to Mr. R.S. at the Committee's request, stating that in her view the proper course was for Mr. R.S. to make the request himself. However, the Ombudsman did respond that as a general matter she may review the conduct of a governmental organization's representative while acting on a board.

Since the Ombudsman does not appear to have addressed the actions of the OEV in question, and given her agreement that such actions are reviewable by her, the Sub-committee believes that the information requested should have been provided to Mr. R.S. While it appears the Ombudsman has refused to provide this information to Mr. R.S. only because the request came from the Sub-committee, we agree with the Sub-committee that whether the request comes from Mr. R.S. or the Sub-committee the information in question should be provided.

The Committee therefore adopts the following Sub-committee recommendation:

17. **That the Ombudsman indicate to Mr. R.S., within 30 days of the tabling of this report, whether she considered the reasonableness of the actions taken by the OEV with respect to the sanctioning of P.S., and if so, that she provide to Mr. R.S. her conclusions and reasons in this regard.**

The second issue which Mr. R.S. believes the Ombudsman failed to consider was whether the OEV had acted unreasonably in denying Mr. R.S. an opportunity to cancel the loan agreement at a time when the OEV had advanced only \$75,000. In response to this complaint, the Ombudsman noted that Mr. R.S. had signed a legally-binding Loan and Shareholding Agreement and then signed a subsequent financing agreement which superseded the earlier one. She then concluded as follows:

In my view, by affixing his signature on these documents, Mr. S signified his agreement to abide by the terms contained therein. In light of the fact that he accepted new financing terms from OEV, I cannot support his allegations that OEV acted unreasonably in this instance.

The Ombudsman's conclusion appears to be that the OEV did not act unreasonably since it had simply acted pursuant to the legal terms of its agreements in responding to Mr. R.S.'s request to cancel the loan. The Ombudsman does not appear to consider whether the OEV acted reasonably in insisting that the strict terms of the agreement be complied with.

The Sub-committee believes that the Ombudsman was entitled to examine not just whether the OEV had the right or power to do what it did, but whether it acted reasonably and in good faith in the enforcement of that right or exercise of that power. This would require, among other things, considering whether the OEV acted reasonably in refusing to accept Mr. R.S.'s offer to repay the loan. Since, as indicated, in the Sub-committee's view the Ombudsman's report did not directly address this issue, it wrote to the Ombudsman to ask that she inform Mr. R.S. as to whether she had considered the reasonableness of the OEV's refusal to accept his offer to repay the loan, and if so, whether she found that refusal to be reasonable.

As noted above, the Ombudsman has refused to provide such information to Mr. R.S. at the request of the Sub-committee, suggesting that Mr. R.S. should raise

his concerns with her directly. As we stated above, we believe that whether the request comes from Mr. R.S. or the Sub-committee the information in question should be provided. The Committee therefore adopts the following Sub-committee recommendation:

- 18. That the Ombudsman indicate to Mr. R.S., within 30 days of the tabling of this report, whether she considered the reasonableness of the OEV's refusal to accept Mr. R.S.'s offer to repay the loan, and if so, whether she found that refusal to be reasonable.**
2. The second area of criticism the Sub-committee considered concerned the Ombudsman's failure to contact witnesses. Mr. R.S. stated that at the beginning of the investigation he indicated to the Ombudsman that Mr. L.O., a former General Manager of one of the companies involved in the transactions in question, was an important witness. Although Mr. L.O. called the Ombudsman to offer his views, Mr. R.S. states that Mr. L.O. was never contacted by the Ombudsman for an interview. Mr. R.S. stated that the Ombudsman's Office had also failed to seek the opinion of an industry-related person concerning the reasonableness of the actions of the OEV and OEC, although it had indicated that it would do so.

While the Sub-committee recognizes that the Ombudsman has a broad discretion to determine how she conducts her investigation, it felt that Mr. R.S.'s concerns were important and therefore wrote to the Ombudsman and asked her to indicate why a greater effort was not made to interview Mr. L.O. and why the opinion of an industry-related person was not sought. As noted above, she refused to provide such information. The Committee agrees with the Sub-committee that this information should be provided and therefore adopts the following Sub-committee recommendation:

- 19. That the Ombudsman inform Mr. R.S., within 30 days of the tabling of this report, of the reasons why a greater effort was not made to interview Mr. L.O., and of the reasons why the opinion of an industry-related person concerning the reasonableness of the actions of the OEV and OEC, as compared to industry standards and procedures, was not obtained.**

3. Mr. R.S.'s third criticism concerned the period of time it took to consider his complaint. The Sub-committee noted that approximately two and one-half years passed from the time Mr. R.S. approached the Ombudsman in September, 1987 to the time the Ombudsman delivered her final report in June, 1990. In addition to the usual concerns with delays of this length, Mr. R.S. pointed out that in this instance the delay resulted in his file being transferred at least twice. Mr. R.S. commented that these transfers substantially affected the effectiveness with which the Ombudsman reviewed and considered his complaints against the OEV.

We recognize that the transfer of files is inevitable. However, the likelihood of such transfers increases with the length of time it takes to dispose of a case, a fact which illustrates the serious dangers of delay. As in all circumstances where the delay in completing an investigation is of this nature, we believe some explanation of the reasons for the delay is warranted. The Committee therefore adopts the following Sub-committee recommendation:

20. **That the Ombudsman inform Mr. R.S., within 30 days of the tabling of this report, of the reasons for the delay in processing his complaint.**

PART X: REVIEW OF THE *OMBUDSMAN ACT*

The Committee has on a number of occasions dating back to 1978 made recommendations concerning the need to introduce amendments to the *Ombudsman Act*. These recommendations have followed and supported proposals made by a number of previous Ombudsmen in this respect. Some of the particular amendments that previous Ombudsmen have proposed are:

- to allow the Ombudsman to comment publicly when the Ombudsman believes it is in the public interest;
- to require the Ombudsman to conduct educational programs to better inform the public about his or her responsibilities;
- to broaden the Ombudsman's power to bring an application concerning the interpretation of the Act;

- to permit the government to make monetary payments to people who have suffered a loss as a result of government action; and
- to allow governmental organizations to reconsider their decisions where their current legislation does not provide for this.

Although previous Ombudsmen have raised the need for amendments repeatedly, no action had been taken in this regard until the previous government introduced *Bill 80 - An Act to amend the Ombudsman Act and the Child and Family Services Act, 1984*. This bill contained a number of valuable amendments which would have addressed a range of concerns Ombudsmen have raised with respect to the Act. These included amendments:

- expanding the scope of investigations and the power to make reports;
- authorizing Ministries to make payments pursuant to a recommendation of the Ombudsman;
- expanding the Ombudsman's responsibilities to include engaging in public education to inform members of the public of the Ombudsman's function; and
- enabling the Ombudsman to bring applications concerning the interpretation of the Act.

However, it should also be noted that Bill 80 included amendments which would have limited the Ombudsman's power to review the merits of tribunal decisions as well as decisions of Cabinet. The Committee understands that the previous Ombudsman did not support these particular amendments, and the present Ombudsman has concerns with respect to some of the amendments in Bill 80.

Bill 80 received first reading on November 21, 1989 but did not proceed past this stage, and is now no longer before the Legislature. As indicated, not all of the amendments contained in Bill 80 were supported by either the previous or the present Ombudsman. Nonetheless, its demise means that the concerns originally raised by previous Committees and Ombudsmen remain unaddressed. The Committee contacted the Attorney General to determine whether he intended to introduce some or all of the amendments included in Bill 80. The Attorney

General has indicated that he is not, at this time, considering re-introducing the amendments included in Bill 80. However, he commented that he would welcome the Committee's views on the need for these or any other amendments.

The amendments proposed by previous Ombudsmen reflected responses to specific needs that had arisen over the course of the many years that the Office of the Ombudsman has operated. We continue to believe that those amendments should be considered by the Legislature. However, we also believe that the present amendments may not reflect all of the changes which the Act may require and which a comprehensive review of the Office of the Ombudsman might reveal. In this respect, we have identified in this Report a number of aspects of the Act which require clarification and which should therefore be considered as part of a comprehensive review of the Act. More importantly, we note that 17 years have passed since the Act was adopted and in that time no comprehensive review of its effectiveness has been undertaken. We believe it is natural at this stage in the history of the Office of the Ombudsman in Ontario that such a comprehensive review be undertaken of the *Ombudsman Act*, in order to assess as a whole how effective it is in achieving its objectives, and to identify how it might be improved.

This review should involve consultation with the public and with the Ombudsman and government officials. Such a review might also benefit from considering developments in other jurisdictions during this period. The Committee notes that a similar review was recently undertaken of the Office of the Commonwealth Ombudsman in Australia, the first review of that Office since its creation 15 years earlier. The results of this review may provide some useful experience with which to compare our own experiences.

Given this Committee's responsibility for reviewing the affairs of the Office of the Ombudsman and our extensive knowledge of its operations, we believe it would be natural to direct our Committee to conduct this review. The need for amendments has been before the government for a very long time. We believe

therefore that this review should be undertaken without delay and that this Committee should be directed to make arrangements to hold hearings and to report to the Legislature by December 15, 1992.

Accordingly, we recommend:

21. That the Standing Committee on the Ombudsman undertake a comprehensive review of the Office of the Ombudsman which should include but not be limited to:

- **An examination of all aspects of the *Ombudsman Act*.**
- **The scope of the Ombudsman's jurisdiction.**
- **The performance of the Office of the Ombudsman in the exercise of its powers and functions.**
- **The adequacy of the resources of the Office of the Ombudsman to perform its various functions.**
- **The relationship of the Office of the Ombudsman to other organizations involved in hearing complaints about government actions.**
- **The mandate of and role to be played by the Standing Committee on the Ombudsman;**

And that the Committee hold hearings and consult as it deems appropriate and that it complete and report the results of its review by December 15, 1992.

SUMMARY OF RECOMMENDATIONS

1. That consideration be given to amending the *Ombudsman Act* to provide that the Ombudsman has the power, on the request of a complainant and a governmental organization, to assist them in reaching a settlement of their dispute. This possible amendment should be considered as part of a more general review of the *Ombudsman Act* to be conducted by this Committee. (Page 12 in the text of this report)
2. That the Ombudsman include in his or her Annual Reports the following information:
 - (a) comparative data from the previous fiscal year;
 - (b) graphs which show the number of complaints brought against a particular governmental organization and the stage at which those complaints were resolved; and
 - (c) tables which indicate the status of any recommendations outstanding from previous years. (17)
3. That section 4(ii) of Regulation 697 under the *Ombudsman Act* be amended to state:

No member of the Ombudsman's staff shall express to anyone other than the Ombudsman, or delegate of the Ombudsman, any opinion, recommendation, or other similar comment respecting the matter being investigated or respecting anything else arising out of the investigation. (20)

4. That the question of expansion of the Ombudsman's jurisdiction form part of a more general review of the *Ombudsman Act* to be conducted by the Committee. (23)
5. That the Standing Orders be amended to provide that the estimates of the Ombudsman are not to be referred to the Standing Committee on Estimates as they are at present, but are instead to be referred to the Standing Committee on the Ombudsman which shall review them from time to time as they become available, and report on them to the Legislature and make such recommendations as the Committee deems appropriate. (26)

6. That the Provincial Auditor conduct a value for money audit of the operations of the Office of the Ombudsman. (27)
7. That the following be established as a rule under s. 15 of the *Ombudsman Act*:
 - S. 9 (1) Following the submission of a report to the Assembly pursuant to s. 21(4) of the Act, the Ombudsman shall continue to monitor the governmental organization's response to the recommendations made by the Ombudsman, and by the Standing Committee on the Ombudsman, in relation to the report.
 - (2) For the purposes of ss. (1), such monitoring shall include continuing to assess the adequacy of the governmental organization's further response, bringing developments in this respect to the attention of the Standing Committee on the Ombudsman, and reporting in the Ombudsman's Annual Reports on the status of all such recommendations outstanding. (32)
8. That the Ombudsman bring an application pursuant to s. 14(5) of the *Ombudsman Act* to clarify the meaning of s. 12 and in particular to determine whether it prevents her from:
 - (a) releasing documents to the Committee which were exchanged between the Ombudsman and the complainant and with respect to which the complainant's written authorization to release the documents has been obtained;
 - (b) disclosing information to the Committee concerning her handling of an investigation; and
 - (c) disclosing information to the Committee clarifying the content of her report to a complainant where the complainant has authorized the Committee to make enquiries on his or her behalf, and has authorized the Ombudsman to release such information to the Committee. (40)
9. That consideration be given to amending s. 12 of the *Ombudsman Act* to provide that the Ombudsman is not prevented from disclosing the information referred to in

Recommendation 8 above, and that this form part of a more general review of the *Ombudsman Act* to be conducted by this Committee. (40)

10. That the Ombudsman inform Mrs. H, within 30 days of the tabling of this report, of the reasons for the delay in processing her complaint and, in particular, convey to her the reasons for the delay during the period from November 22, 1989 to November 6, 1990. (42)
11. That the Ombudsman indicate to Mr. V, within 30 days of the tabling of this report, whether she considered the reasonableness of the Board's policy, and if so, provide to Mr. V her conclusions and reasons in this regard. (43)
12. That the Ombudsman convey to Mr. V, within 30 days of the tabling of this report, her reasons for deciding that it was inappropriate to comment on the failure of the *Health Disciplines Act* to provide for an appeal mechanism from decisions of the Board of Examiners in Psychology. (44)
13. That the Ombudsman inform Mr. VV, within 30 days of the tabling of this report, of her conclusions as to what she believed would have been a reasonable approach to the reclassification process, and of the specific steps that she recommended the Ministry take to ensure that the inconsistencies in question are not repeated. (46)
14. That the Ombudsman inform Mr. VV, within 30 days of the tabling of this report, of the reasons for the delay in processing his complaint and, in particular, convey to him the reasons for the delay during the period from August 28, 1989 to October, 1990. (47)
15. That the Ombudsman reconsider Mr. S's request that the Ombudsman reopen her investigation into his complaint concerning the Workers' Compensation Appeals Tribunal. (49)
16. That the Ombudsman convey to Mr. A, within 30 days of the tabling of this report, the result of the Ministry's review of the Ombudsman's recommendation and the Ombudsman's position as to whether the Ministry's response was adequate and appropriate. (50)
17. That the Ombudsman indicate to Mr. R.S., within 30 days of the tabling of this report, whether she considered the reasonableness of the actions taken by the OEV with respect to

the sanctioning of P.S., and if so, that she provide to Mr. R.S. her conclusions and reasons in this regard. (52)

18. That the Ombudsman indicate to Mr. R.S., within 30 days of the tabling of this report, whether she considered the reasonableness of the OEV's refusal to accept Mr. R.S.'s offer to repay the loan, and if so, whether she found that refusal to be reasonable. (54)
19. That the Ombudsman inform Mr. R.S., within 30 days of the tabling of this report, of the reasons why a greater effort was not made to interview Mr. L.O., and of the reasons why the opinion of an industry-related person concerning the reasonableness of the actions of the OEV and OEC, as compared to industry standards and procedures, was not obtained. (54)
20. That the Ombudsman inform Mr. R.S., within 30 days of the tabling of this report, of the reasons for the delay in processing his complaint. (55)
21. That the Standing Committee on the Ombudsman undertake a comprehensive review of the Office of the Ombudsman which should include but not be limited to:
 - An examination of all aspects of the *Ombudsman Act*.
 - The scope of the Ombudsman's jurisdiction.
 - The performance of the Office of the Ombudsman in the exercise of its powers and functions.
 - The adequacy of the resources of the Office of the Ombudsman to perform its various functions.
 - The relationship of the Office of the Ombudsman to other organizations involved in hearing complaints about government actions.
 - The mandate of and role to be played by the Standing Committee on the Ombudsman;

And that the Committee hold hearings and consult as it deems appropriate and that it complete and report the results of its review by December 15, 1992. (58)

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